

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 20TH DAY OF MARCH 2019 / 29TH PHALGUNA, 1940

WP (C) .No. 27226 of 2018

PETITIONER:

JILMON JOHN,
GOVERNMENT CONTRACTOR, MADATHIL HOUSE, MANAKKAD P.O.,
THODUPUZHA, IDUKKI DISTRICT-685608.

BY ADVS.
SRI.K.BABU THOMAS
SMT.MARYKUTTY BABU

RESPONDENTS:

- 1 STATE OF KERALA
REP.BY THE SECRETARY TO GOVERNMENT, PUBLIC WORKS
DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM-695001.
- 2 THE SECRETARY TO THE GOVERNMENT,
FINANCE DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM-695001.
- 3 THE SUPERINTENDING ENGINEER,
P.W.D. ROADS AND BRIDGES, CENTRAL CIRCLE, ALUVA,
ERNAKULAM DISTRICT-683101

R1 TO R3 BY SRI.K.V.MANOJ KUMAR, SPECIAL GOVERNMENT
PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
12.03.2019, THE COURT ON 20.3.2019 DELIVERED THE FOLLOWING:

C.R.

J U D G M E N T

This writ petition is filed by the petitioner seeking to quash Exts.P2, P5, P8 and P10 and pass orders on Ext.P12 for release and refund of EMD of Rs.2,00,000/- furnished by the petitioner along with the tender submitted on 3.6.2017 and to re-notify the tender for the work incorporating GST to afford an opportunity to petitioner to participate in it and for other consequential reliefs.

2. Material facts for the disposal of the writ petition are as follows; in response to Ext.P1 e-tender notice dated 20.5.2017 issued by the 3rd respondent for "Improvements to Thodupuzha Pappotty Hall Vellangallor (River V View) Road", petitioner submitted a tender on 3.6.2017 taking into account the rate of works tax at the rate of 4% stipulated in section 8 of the Kerala Value Added Tax Act, 2003 (VAT) as per the special conditions contained in the notice inviting tender. According to the petitioner, the Central Goods and Services Tax Act,2017(GST) was

implemented w.e.f. 1.7.2017 imposing GST at 18% on the value of works. By Ext.P2 letter dated 14.7.2017 3rd respondent accepted the tender submitted by the petitioner with probable amount of contract of Rs.4,66,38,279/- and directing him to execute an agreement for carrying out the works.

3. Petitioner submitted Exts.P3 and P4 representations requesting either to reimburse the additional tax imposed at 14% over the 4% specified in Ext.P1 or cancel Ext.P1 and release and refund the EMD of Rs.2,00,000/-furnished by him and insisted acceptance of the tender submitted without any variation from Ext.P1. Anyhow 1st respondent sent Ext.P8 letter to the petitioner without considering the request either to reimburse differential tax imposed by the GST or to release the EMD of Rs.2,00,000/- furnished by him along with the tender. Third respondent by Ext.P10 directed to execute an agreement for carrying out the works with GST, which according to the petitioner, is not incorporated in Ext.P1 and therefore, the action is without jurisdiction and illegal and Exts.P2, P5, P8 and P10 are illegal and arbitrary and therefore liable to be

interfered with by this court with a direction to the respondents to release the EMD of Rs.2,00,000/- furnished by him in view of the failure on the part of the respondents to accept the tender in the manner stipulated in tender documents in Ext.P1.

4. That apart it is submitted that, the 1st respondent remains inactive on Ext.P12 representation of the petitioner in violation of the fundamental rights of the petitioner under Articles 19(1)(g) and 21 of the Constitution of India. It is in this background facts, the specified reliefs are sought for by the petitioner.

5. Third respondent has filed a detailed counter affidavit disputing the allegations and claims and demands raised by the petitioner. The invitation of tender, submission of tender by the petitioner etc. are all accepted by the 3rd respondent. Among other contentions, it is stated that, as per paragraph 44 of the tender notice, evident from Ext.R3(a), it is stipulated that, the bidder shall be responsible for the payment of Sales Tax as per rules from time to time and petitioner had agreed to the said condition also while signing and submitting his tender.

Therefore, he is bound to remit the GST introduced w.e.f.1.7.2007. Further Ext.P1 special condition No.1 provides for payment of all applicable tax during execution of work. It was understanding the liabilities imposed upon the bidders, petitioner executed a preliminary agreement viz., Ext.R3(b). Ext.R3(b) also provides for payment of tax at the rate prevailing at the time of execution of work. It is also pointed out that, the notification of GST was not a surprise notification issued by the Government and Ext.P1 was originally published on 20.5.2017 and the petitioner submitted the bid on 3.6.2017. During all the said period, the notification to the effect that GST will come into force on 1.7.2017 was available and the petitioner was also aware of the said position. In that circumstances, Ext.P1, notice inviting tender provides for payment of tax at the rate prevailing during the execution of the work. Exts.R3(a) and R3(b) also stipulate for payment of tax that are introduced in future. So also knowing fully well the fact that GST will be notified on 1.7.2017 confirming the specified requirement to pay tax at the rate prevalent at the time of execution of

work as notified in Exts.R3(a) and R3(b) petitioner submitted his bid. Therefore, now the petitioner cannot wriggle out of the contractual obligation by stating that petitioner is liable to pay only tax as notified in Ext.P1 as well as in Exts.R3(a) and R3(b).

6. The State Government has issued a Government Order dated 27.1.2018 to clarify the different issues raised by the PWD contractors on introduction of the GST. Paragraph 10 of the Government Order stipulates that, the Executive Engineers in the PWD have been directed to deduct only 2% GST from work bills in place of 4% VAT. The GST Council, however, fixed GST on work contracts related to PWD road works at 12% including the 2% deducted by the Executive Engineers. The remaining 10% of GST has to be paid by the PWD contractors directly to the GST department. The PWD or none of the officers coming thereunder has power either to reduce, exempt or reimburse any portion of the GST charges on PWD work bills on any grounds or circumstances.

7. So also it is submitted that, consequent to introduction of GST from 1.7.2017, petitioner is

liable to pay tax at 14% is also baseless. Petitioner had earlier filed W.P.(C) No.25360/2017 raising very same issues and this court as per the judgment dated 1.8.2017 directed the 2nd respondent to consider and pass orders on the representation submitted by the petitioner within one month from the date of receipt of the copy of the judgment after hearing the petitioner. Soon on receiving the copy of the above judgment, 3rd respondent put maximum efforts on the representations to make a vivid picture of the dispute of 14% additional tax liability alleged by the petitioner. Third respondent has also made all efforts to make a clear cut comparison of exact figures between VAT and GST in the case of the work in question. It is clear that, the main peculiarity of the GST system is the input tax credit system favouring the purchaser of the materials and unlike in the case of Sales Tax (VAT), petitioner is eligible for input tax credit in the system of GST on purchase of all the 44 materials required for the work except water. In order to conduct an effective comparison, 3rd respondent with the help of the GST cells of State Commercial Tax Department in

Thiruvananthapuram and Palakkad, collected input tax credit rates of various 44 materials required for the work under dispute during September, 2017 and has made a comparison between GST and VAT applicable for the work in question using the said exact figures and data. From the said comparison, it became explicitly clear that, instead of the alleged 14% tax liability, petitioner is actually going to enjoy a tax benefit equal to an amount of Rs.8,05,576/-. The details of this comparison were submitted to the 1st respondent vide two letters viz., Ext.R3(e) dated 18.9.2017 and Ext.R3(d) dated 25.9.2017. The details of the comparison prepared in tabular form, is produced as Ext.R3(e).

8. It is also submitted that, petitioner had been invited for hearing on 15.9.2017 as directed by this court in the judgment dated 1.8.2017 and his arguments were heard and petitioner was made aware of all the facts including the input tax credit in GST and comparison between VAT and GST in the work in question. Therefore, according to the 3rd respondent, the introduction of GST system has actually brought to him an additional benefit of Rs.8,06,576/- and

petitioner was requested to execute an agreement for the work at an earlier date. Petitioner was also requested to execute the agreement as per the communication dated 30.4.2018 within three days from the date of receipt of the letter and he was also informed that, if he failed to execute within the time limit, the department will be compelled to take necessary action as per the prevailing Rules. Such letter was issued since petitioner was not responding to any of the communications issued by the 3rd respondent. It is also submitted that, petitioner has to sign the contract as per Ext.P10, however, petitioner did not comply with any of the requests/directions issued by the 3rd respondent. Therefore, according to the 3rd respondent, petitioner has not made out any case justifying interference of this court under Article 226 of the Constitution of India.

9. A reply affidavit is filed by the petitioner refuting the contentions raised in the counter and also the calculation with respect to the benefit accrued to the petitioner on account of introduction of GST and the input credit etc. etc. According to

the petitioner, the calculation so made by the 3rd respondent and produced as Ext.R3(e) is not true or correct. So much so it is submitted that, as per the calculation made by the petitioner, an extra liability of an amount of Rs.22,45,163/- will accrue to the petitioner on account of the GST with reduced rate of 12% of the value of works even after set off of input tax credit of Rs.14,85,899/- with respect to the purchase of all the materials required for carrying out the work. Petitioner has also calculated the facts and figures arrived at by the petitioner and submits that, the introduction of GST at the time of notice inviting tender was not a condition incorporated thereunder and therefore, the respondents are not at liberty to introduce such a condition while executing the agreement and accordingly, they are bound to return the EMD amount to the petitioner as is claimed in the writ petition.

10. I have heard Learned counsel for petitioner, Sri.Babu Thomas.K., learned Special Government Pleader, Sri.K.V.Manoj Kumar and perused the pleadings and documents on record.

11. The sole question to be considered is,

whether petitioner is liable to pay the tax in terms of the Central Goods and Services Tax Act, 2017(GST) as is claimed by the respondents ? According to the petitioner, as per Ext.P1 notice inviting tender, special conditions are incorporated in respect of Kerala Value Added Tax. As per the Kerala Finance Act, 2008, in case of civil works awarded by Government of Kerala, tax is liable to be paid at 4% of the gross amount of bill from the bidders every time and it will be retained by the concerned PWD officers when the bills for the work is passed for payment and the amounts so retained shall be credited to the Sales Tax Department. Therefore, according to the petitioner, petitioner is liable to pay only tax at the rate of 4% as per the special conditions. It is also submitted that, the notice inviting tender is dated 20.5.2017 whereas the Goods and Service Tax Act was introduced on and w.e.f. 1.7.2017 alone. It is also submitted by the learned counsel that, as per paragraph (3) of Ext.P2 communication issued by the Superintending Engineer dated 14.7.2017, it is clear that, on no account rates once fixed will be increased and therefore, according to the petitioner,

later respondents are not at liberty to resile and turn around from the conditions contained under Ext.P1 notice and other stipulations put forth in the selection notice and insist the petitioner to execute an agreement imposing a liability undertaking to pay the tax in accordance with the Goods and Services Tax Act. It is also submitted by the learned counsel for petitioner that, respondents are not at liberty to insist that, petitioner should enter into an agreement incorporating any condition, which was not notified at the time of issuance of Ext.P1 notice inviting tender.

12. Therefore, the sum and substance of the contention advanced by the learned counsel is that, there is no laches or lethargy on the part of the petitioner in executing the agreement. But the agreement is unable to be executed by the petitioner since unconscionable conditions are put forth by the respondents as per Ext.P5 and other correspondences issued by the respondents. Even though petitioner has submitted Ext.P3 and other representations before the respondents, none of the aspects put forth by the petitioner was taken into account. However, the State

Government has resorted to in issuing Ext.P9 notification dated 27.1.2018 issuing directions in the manner in which the amounts are to be recovered in accordance with the provisions of the Goods and Services Tax Act. According to the petitioner, since petitioner found that, the case put forth by the petitioner was not understood by the respondents, petitioner has submitted Exts.P12 representation before the 1st respondent , however, no action was taken by the 1st respondent to ventilate the grievance of the petitioner.

13. On the other hand, learned Special Government Pleader has invited my attention to clause 44 of Ext.P1 tender inviting notice, wherein it is stipulated as follows:

"The bidder shall be responsible for the payment of sales tax as per rules in force from time to time and the rates quoted for various items remain unaffected by any changes that may be made from time to time in the rate at which such tax is levied. Sales tax agricultural income tax and income tax due to Government from the bidder will be recovered from his bill for the work as per the advise of the authorities concerned."

14. It is also pointed out by learned Special

Government Pleader that, the GST was in fact proposed to be introduced earlier, however, it was brought into effect w.e.f. 1.7.2017 and therefore, the contentions put forth by the petitioner that, petitioner was not aware when he executed the preliminary agreement is not true or correct. It is further submitted that, since the petitioner is entitled to the input tax credit for the 44 materials used for the work, petitioner is only benefited by more than an amount of Rs.8,00,000/-. However, according to the petitioner, as per the calculation made by the petitioner, even after adjustment of the input tax credit, petitioner is liable to pay more amount.

15. I have considered the rival submissions made across the Bar and I am of the considered view that, there is a stipulation contained under clause 44 of Ext.P1 that, the Sales Tax as per Rules from time to time is liable to be paid by the petitioner and the rates quoted for various items remain unaffected by any changes that may be made from time to time at which such tax is levied. The case projected by the petitioner is that, as per the special condition,

petitioner is liable to pay Value Added Tax at the rate of 4%. However, on a harmonious construction of clause 44 as well as special condition contained under Ext.P1, even though petitioner was only liable to pay tax at the rate of 4% when notice inviting tender was issued, if during the course of proceedings or even after execution of the agreement, if the tax is increased, petitioner is liable to pay the same as per the stipulations contained under clause 44 quoted above without insisting for any rate variation. So also the tender is to be submitted by a bidder taking into account various factors and components and a little bit of speculation is also required. When clause 44 was incorporated in Ext.P1 tender notification and the introduction of GST was under comprehension and in fact it was made without being introduced and therefore, it cannot be said that, petitioner was not aware of the likelihood of legislation being introduced on and with effect from a future date. Therefore, necessarily, petitioner ought to have visualised such a situation and the rates should have been quoted only in accordance with the same. It is also clear from Exts.R3(a) and R3(b),

petitioner has quoted less than the probable amount of contract and according to the learned Special Government Pleader, petitioner wants now to wriggle out of the contract without causing any injury to him.

16. In this context I have come across the judgment of the Apex Court in **Syndicate Bank v. R. Veeranna and others** [(2003) 2 SCC 15, wherein the issue of hike in interest was considered in respect of bank transactions and held as follows in paragraph 7:

7. The High Court while holding that the party is bound to pay the interest at the agreed rate took the view that the Bank could not automatically charge the increased rate of interest merely on the basis of rise of interest on account of the RBI circulars. It is not a case of automatically charging the increased rate of interest; charge of higher rate is based on agreement between the parties. The High Court was clearly in error in holding that the principles of natural justice were violated on the ground that the defendants were not put on notice before enhancing the rate of interest when the parties are bound by the terms of the contract. The application of the principles of natural justice cannot be read into the express

terms of the contract. The other reason given by the High Court to affirm the decree of the trial court was that the plaintiff Bank violated the circulars/instructions given by the head office and as such the plaintiff could not claim higher rate of interest. We are not in a position to approve this view of the High Court. The instructions given by the head office to the branches were only for their guidance and to safeguard the interest of the Bank in case of dispute. At any rate, these instructions cannot vary the terms of agreement between the parties. In other words, they could not alter the terms of Exts. P-1, P-5 and P-11.

17. That apart GST is nothing but tax on supply of goods, supply of service and supply of goods and services, however, a homogeneous mixture of several of the indirect taxes under a single umbrella, having uniform rate through out the country, on any goods or service covered by GST. Therefore, the contention advanced by learned counsel for petitioner that, GST is not tax enabling the respondents to rely upon clause 44 of Ext.P1, is devoid of merits. It is also a condition liable to be undertaken by the petitioner, in order to execute the agreement. Which thus means, petitioner is not at liberty to introduce any legal principle to his rescue so as to interfere with the rule of the game

provided under Ext.P1 notice inviting tender, having an express stipulation for enhancement of rate of tax from time to time. Therefore, evaluating the entire *pros and cons* and facts and circumstances of the case, I am of the considered opinion that, petitioner is not entitled to get any relief as is sought for in the writ petition since there was a clear stipulation that, petitioner is liable to pay tax increased from time to time.

The writ petition has no sustenance, accordingly it is dismissed.

Smv
16.3.2019

Sd/-

SHAJI P.CHALY

JUDGE

APPENDIX OF WP(C) 27226/2018**PETITIONER'S EXHIBITS:**

- EXHIBIT P1 TRUE COPY OF RELEVANT PORTION OF THE TENDER NOTICE AND TENDER DOCUMENTS DATED 20/5/2017
- EXHIBIT P2 TRUE COPY OF THE LETTER OF ACCEPTANCE ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER DATED 14/7/2017
- EXHIBIT P3 TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER TO THE 3RD RESPONDENT DATED 25/7/2017
- EXHIBIT P4 TRUE COPY OF REPRESENTATION TO THE RESPONDENTS 1 AND 3 DATED 25/7/2017
- EXHIBIT P5 TRUE COPY OF LETTER OF THE 3RD RESPONDENT TO EXECUTE AGREEMENT WITH GST AT 18% OF VALUE OF WORKS
- EXHIBIT P6 TRUE COPY OF JUDGMENT IN WP(C) NO.25360 OF 2017 DATED 1/8/2017
- EXHIBIT P7 TRUE COPY OF THE REPRESENTATION OF THE PETITIONER DATED 21/10/2017
- EXHIBIT P8 TRUE COPY OF LETTER OF THE FIRST RESPONDENT DATED 6/4/2018
- EXHIBIT P9 TRUE COPY OF G.O. (P) NO.2/PWD ISSUED BY THE GOVERNMENT IN RESPECT OF GST.
- EXHIBIT P10 TRUE COPY OF LETTER OF THE 3RD RESPONDENT DIRECTING TO EXECUTE AGREEMENT WITHIN 3 DAYS THREATENING PENAL ACTION DATED 4/5/2018
- EXHIBIT P11 TRUE COPY OF REPRESENTATION OF THE PETITIONER TO THE 3RD RESPONDENT.
- EXHIBIT P12 TRUE COPY OF REPRESENTATION OF THE PETITIONER TO THE FIRST RESPONDENT.
- EXHIBIT P13 TRUE COPY OF JUDGMENT IN WP(C) NO. 35436 OF 2017 OF THIS HONOURABLE COURT.
- EXHIBIT P14 TRUE COPY OF LETTER NO. IND AND PW B-2/129/FIN. OF THE SECRETARY TO GOVERNMENT, FINANCE DEPARTMENT TO THE GENERAL SECRETARY, KERALA GOVERNMENT CONTRACTORS ASSOCIATION ASSURING TO INCORPORATE GST IN

**ALL ESTIMATES FOR PUBLIC WORKS DATED
16/10/2018**

EXHIBIT P15 TRUE COPY OF STATEMENT OF ACCOUNTS WITH
VALUE OF MATERIALS TO BE PURCHASED FOR ROAD
IMPROVEMENT WORKS INCLUDED IN EXT.P1 IS
RS.2,28,59,987/- AND EXTRA LIABILITY OF RS.
22,45,163/-.

RESPONDENT'S EXHIBITS:

EXHIBIT R3 (A) TRUE COPY OF THE RELEVANT PAGE OF TENDER
NOTICE

EXHIBIT R3 (B) TRUE COPY OF THE PRELIMINARY AGREEMENT

EXHIBIT R3 (C) TRUE COPY OF THE LETTER NO.E2-2265/2017
DATED 18.9.2017

EXHIBIT R3 (D) TRUE COPY OF THE LETTER NO.E2-2265/2017
DATED 25.9.2017

EXHIBIT R3 (E) TRUE COPY OF THE DETAILS OF THE COMPARISON
PREPARED BY THE 3RD RESPONDENT EXTRACTED IN
TUBULAR FORM